



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC MISCELLANEOUS CASE NO.298 OF 2018**

**IN THE MATTER OF SECTION 13,17 & 56 OF THE TRUSTEES ACT CAP 167**

**AND IN THE MATTER OF THE LAND PARCEL NO.LIMURU/BIBIRIONI/XXXX**

**AND**

**IN THE MATTER OF JZ, IC & YK (MINORS)**

**ZNC..... APPLICANT**

**JUDGMENT**

The ex-parte Applicant herein **ZN**, filed this **Originating Summons** dated **27<sup>th</sup> November 2018**, brought under **Order 37 Rule 19f) of the Civil Procedure Rules 2010, Section 3A of the Civil Procedure Act** and all enabling provisions of law and sought for these orders:-

- 2) That the Applicant be granted authority as the proprietor in trust for JZ, IC and YK (minors)**
- 3) That costs of this application be in the cause.**

The Application is premised on the following grounds.

- 1) That the applicant is the biological mother of the minors.**
- 2) That the parents of the minors have been divorced since 2013.**
- 3) That the Applicant has been exercising parental responsibility over the children solely out of her meager resources since the divorce.**
- 4) That the Applicant is in dire need of funds to cater for education and other expenses of the minors.**
- 5) That it is in the best interest of the minors to grant the orders sought herein.**

The application is also supported by the affidavit of the Applicant wherein she averred that she was previously married and her ex-husband and herself were blessed with three issues who are **JZ** aged 17 years, **IC** aged 13 years and **YK** age 6 years who are all school going children. Further that she is now a single mother and since their divorce in 2013, her ex-husband has neglected, failed and/or refused to contribute to the maintenance of the children. She also averred that she is in dire need of funds to cater for education and other expenses of her children, specifically payment of school fees. She attached copies of school documents for ease of reference by the court. It was her contention that her meagre income from her business is not sufficient to meet the needs of the children and school fees. She also contended that she is a proprietor of **LR.No.Limuru/ Bibirioni/xxx**, holding it in trust of her children and she attached a copy of the title deed as **ZNC-3**. She further averred that there is need to sell the above stated parcel of land for the interest of her children and she urged the court to allow her to sell the said parcel of land **Limuru/Bibirioni/xxx**, to cater for her children' education and their other needs.

The application was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the relevant provisions of law and the available exhibits.

The application is premised under **Order 37 Rule 1(f)** of the **Civil Procedure Rules** which provides:-

***“The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a***

deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as foresaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions-

(a) ...

(b) ...

(c) ..

(d) ....

(e) ....

**(f) the approval of a sale, purchase, compromise or other transaction;**

Further, the said Originating Summons is also anchored under **Section 3A** of the **Civil Procedure Act**, which donates to this court the inherent power to issue such orders that are necessary in ensuring that end of justice herein is met and to prevent abuse of the court process.

The Applicant has averred that she is the biological mother of the named minors. She attached their birth certificates which confirmed that the said minors were born on diverse years to **ZN** (Applicant) and one **RK**. She also contended that she is now divorced from the said **RK** and she lives with the minors as a single mother and her ex-husband has neglected, failed and/or refused to take care of the above named minors who are all school going and depend entirely on her.

There is also no doubt that the Applicant is a holder of title deed for **Limuru/Bibirioni/xxx** issued on **16<sup>th</sup> February 2016**, and she is to hold it in trust for the named minors.

The Applicant contended that she is in dire need of funds to cater for the school fees of the minors and other needs and thus the need to sell the suit property **Order 37 Rule 1(f)** provides that if a trustee needs to have any relief of any kind as a trustee, then she/he needs to do so via an Originating Summons. The Applicant who is holding the suit property in favour of the minors has filed the instant Originating Summons.

Further, **Section 56(1)** and **(3)** of the **Trustees Act, Cap 167 Laws of Kenya** provides:-

**(1) "Where, in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the court expedient, but cannot be effected by reason of the absence of a power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees either generally or in any particular instance the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit, and may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.**

2).....

**3) An application to the court under this Section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.**

From the above provision of law, the Court has discretion to confer upon the trustee any necessary power to deal with the property such as this one held by the Applicant. Further, this Court has inherent power under **Section 3A** of the **Civil Procedure Act** to issue necessary orders that would ensure that end of justice is met.

The Applicant is holding the suit land in trust for the minors. However, she needs to take care of their needs such as payment of school fees and their other best interest for their well-being.

The Court finds that the necessary order herein that commends is to allow the instant Originating Summons in terms of **prayer No.2** and the proceeds of the sale should specifically be applied in furthering the education needs of the minors and also to cater for their general well-being.

For the above reasons, the Court finds that the **Originating Summons** herein is merited and the Applicant is granted authority as the proprietor in trust for the three named minors for land parcel **No.Limuru/Bibirioni/xxx** to transfer their interest in the land for their use as provided by **Section 56** of the **Trustees Act**. Applicant is to sell the said land for the benefit of the minors herein and costs of the **Originating Summons** shall be in the cause.

It is so ordered.

**Dated, Signed and Delivered at Thika this 28<sup>th</sup> day of May 2019.**

**L. GACHERU**

**JUDGE**

**28/5/2019**

In the presence of

M/S Vundu for the Exparte Applicant

Lucy - Court clerk

Court – Judgment read in open court.

**L. GACHERU**

**JUDGE**

**28/5/2019**